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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JOHN HANLON AND RUTH ANN HANLON, PARENTS AND NEXT FRIENDS OF MICHAEL HANLON, and MARK PLAVIN AND TONY REISS-PLAVIN, PARENTS AND NEXT FRIENDS OF RACHEL PLAVIN,

Petitioners,

-vs.-

DONNA E. SHALALA, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. IS A "DECISION ON ENTITLEMENT" A "FINAL DETERMINATION" UNDER THE TERMS OF THE CHILDHOOD VACCINE INJURY COMPENSATION ACT, SUCH THAT TRADITIONAL PRINCIPLES OF JUDICIAL FINALITY PRECLUDE REOPENING AND A NEW TRIAL, ABSENT COMPELLING CIRCUMSTANCES?

2. SHOULD TRADITIONAL NOTIONS OF FINALITY BE APPLIED TO A VACCINE INJURY "ENTITLEMENT DECISION," ONCE IT IS FULLY AND FAIRLY TRIED IN A BIFURCATED PROCEEDING, EVEN THOUGH DAMAGES MUST BE ADJUDICATED IN ANOTHER BIFURCATED PROCEEDING, PRIOR TO ENTRY OF JUDGMENT BY THE CLERK OF THE COURT?

LIST OF PARTIES

All parties to this and related litigation are listed below:

John Hanlon and Ruth Ann Hanlon, parents and next friends of Michael Hanlon; Mark Plavin and Tony Reiss-Plavin, parents and next friends of Rachel Plavin; James Moody and Janet Moody, parents and next friends of Lindsay Moody; Frank and Laura Gallagher, parents and next friends of Courtney Gallagher; Veronica Flanagan parent and next friends of Ashley Flanagan; Milo Decker and Carla Decker, parents and next friends of Destry Decker; Milo Decker and Carla Decker, parents and next friends of Damien Decker; Mark and Andrea Scheuler, parents and next friends of Tobin Scheuler; John and Alice Hulbert, parents and next friends of Trevor Hulbert; James and Lisa Copeland, parents and next friends of Ashley Copeland; Dawn M. Barnes, mother of Christopher Barnes; Ollie Faye Bradbury, guardian of Amanda Bradbury; Veldon Kouba and Virginia Kouba, legal representatives of Allen Kouba, and Robert Lee Turner and Sandra Kay Turner, legal representatives of Robert Cleveland Turner.

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No. 99-1223

In The

Supreme Court of the United States

October Term, 1999

JOHN HANLON AND RUTH ANN HANLON, PARENTS AND NEXT FRIENDS OF MICHAEL HANLON, and MARK PLAVIN AND TONY REISS-PLAVIN, PARENTS AND NEXT FRIENDS OF RACHEL PLAVIN,

Petitioners,

-vs.-

DONNA E. SHALALA, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, John Hanlon and Ruth Ann Hanlon, parents and next friends of Michael Hanlon, *et al.*, pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in the above

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF ORDERS AND OPINIONS BELOW

The first Decision (on "entitlement") of the Office of Special Masters in and for the United States Court of Federal Claims was an unpublished slip opinion, *Hanlon v. Secretary of DHHS*, No. 90-1013V, Unpub. Slip. Op. (Fed. Cl. Spec. Mstr. May 31, 1994) (App. 1a to 7a).

The companion decision (on "entitlement") of the Office of Special Masters in and for the United States Court of Federal Claims was an unpublished slip opinion, *Plavin v. Secretary of DHHS*, No. 91-1555V, Unpub. Slip. Op. (Fed. Cl. Spec. Mstr. December 29, 1994) (App. 8a to 12a).

The third opinion of the special master, denominated as the "TS Omnibus Decision," is reported in *Barnes et al. v. Secretary of DHHS*, 1997 WL 602115 (Fed. Cl. Spec. Mstr.) (App. 13a to 74a).

A subsequent "Order to Vacate" issue from the special master in *Hanlon v. Secretary of DHHS*, No. 90-1013V, Unpub. (Fed. Cl. Spec. Mstr. Sept. 18, 1997) (App. 75a to 76a).

A subsequent "Order to Vacate" issue from the special master in *Plavin v. Secretary of DHHS*, No. 91-1555V, Unpub. (Fed. Cl. Spec. Mstr. Sept. 18, 1997) (App. 77a to 78a).

The initial opinion of the Court of Federal Claims on review of the *Plavin* matter, and remanding to the special master, is reported at *Plavin v. Secretary of DHHS*, 40 Fed. Cl. 609 (1998) (App. 79a to 109a).

The opinion of the Court of Federal Claims on review of the *Hanlon* matter is reported at *Hanlon v. Secretary of DHHS*, 40 Fed. Cl. 625 (1998) (App. 110a to 128a).

On remand in *Plavin*, the special master issued an unreported decision, *Plavin v. Secretary of DHHS*, 1998 WL 408793 (Fed. Cl. Spc. Mstr.) (App. 129a to 136a).

On subsequent review by the Court of Federal Claims, the

court issued an opinion found at *Plavin v. Secretary of DHHS*, 41 Fed. Cl. 671 (1998) (App. 137a to 142a).

The opinion of the United States Court of Appeals in and for the Federal Circuit is reported at *Hanlon v. Secretary of DHHS*, 191 F.3d 1344 (Fed. Cir. 1999) (App. 143a to 150a).

The companion opinion of the United States Court of Appeals in and for the Federal Circuit is reported at *Plavin v. Secretary of DHHS*, 184 F.3d 1380 (Mem.) (Fed. Cir. 1999) (App. 151a).

The order of the Circuit Court of Appeals in and for the Federal Circuit, dated October 20, 1999 and denying a combined petition for rehearing and suggestion for rehearing *en banc*, (App. 152a to 153a).

The separate judgement of the Circuit Court of Appeals in and for the Federal Circuit is dated September 8, 1999, but issued as a mandate on October 27, 1999 (App. 154a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in and for the Federal Circuit was entered on September 8, 1999. A petition for rehearing and suggestion for rehearing *en banc* was denied on October 20, 1999. Petitioners invoke the jurisdiction of this court under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This matter is governed by the National Childhood Vaccine Injury Compensation Act, 42 U.S.C. §§300aa-10 to 300aa-34. Pursuant to Rule 14(f), all pertinent provisions of this black-letter law (relating to trial jurisdiction, finality, review, and qualifications for entitlement) are reproduced in Appendix N (155a to 159a).

STATEMENT

1. The National Childhood Vaccine Injury Act (Vaccine Act) was enacted in 1986, to establish the National Vaccine Injury Compensation Program. Pub. L. No. 99-660, Tit. III, 100 Stat. 3755, codified as amended at 42 U.S.C. §§ 300aa-10 to 300aa-34. The Vaccine Program is administered by the Secretary of Health and Human Services, and the Act provides that compensation may be paid "for a vaccine-related injury or death."

2. A petitioner may rely on the Vaccine Injury Table (Table), whereby the injury is deemed to be vaccine related. The Vaccine Injury Table specifies the vaccines covered by the Act, including DPT (Diphtheria, Pertussis, Tetanus). The Initial Vaccine Injury Table specified injuries which qualify under deemed causation, including "residual seizure disorder" ("RSD") under 42 U.S.C. § 300aa-14 (b) (2)[1]. The Table sets forth time periods "for first symptom or manifestation of onset or of significant aggravation after vaccine administration." For an RSD related to DPT vaccine, the statutory period is three days. 42 U.S.C. § 300aa-14 (a) I. D.

3. A "decision," the final order of the special master, is to "be issued as expeditiously as practicable." 42 U.S.C. § 300aa-12 (d) (3) (A) (ii). Then, either party may seek review by the Court of Federal Claims. Only then does the Clerk of Court enter judgment. 42 U.S.C. § 300aa-12 (e) (3).

4. The petitions filed on behalf of Michael Hanlon and Rachel Plavin fall under the Table. Michael received a DPT vaccine on the 1st day of June, 1978. The next day he suffered the onset of a Residual Seizure Disorder. Rachel received a DPT shot

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[1]Petitioners, and all parties in the List of Parties, proceed under the Act as it existed prior to administrative amendments. All citations unless otherwise noted are to the Act and the Table as it existed prior to March 10, 1995 changes, whereby *inter alia* the RSD injury category was abolished as to DPT vaccine. The error at issue herein however, survives any and all amendments.

on the 4th day of August, 1989, and within hours suffered the onset of a Residual Seizure Disorder. Michael and Rachel are mentally retarded, which is the medical sequela of their Table Injuries.

5. The proceedings below were labeled as an "omnibus" adjudication, and addressed all vaccine injury claims involving Tuberous Sclerosis (TS—also known as Tuberous Sclerosis Complex, or TSC). TS, which Michael and Rachel were born with, is often associated with seizures and mental retardation. Neither condition is inevitable, however, and the majority of people with TS are intellectually normal. Early-onset seizures (*i.e.*, occurring around the typical dates of childhood vaccination) are the *sine qua non* of mental retardation. The earlier in life seizures begin, the worse the prognosis.

6. These are not the first such proceedings. From 1991 to 1993, prior proceedings before the same special master led to the trial and adjudication of TS entitlement issues in designated "test cases." The special master suggested that an "interlocutory review" (not provided for in the statute) be taken, in order to settle entitlement as a matter of law.

7. On the special master's certification for interlocutory review, and on the subsequent review of another original "test case," the Court of Federal Claims created a per se rule in favor of all TS children whose injury fell under the Vaccine Injury Table. In the first "omnibus" decision on entitlement, the special master found for petitioners. *Costa v. Secretary of DHHS*, Case No. 90-1476V (Cl. Ct. Spc. Mstr. February 26, 1992). On interlocutory review the Court of Federal Claims remanded. *Costa v. Secretary of DHHS*, 26 Cl. Ct. 866 (1992). Under the *Costa* remand, the theory of entitlement was placed under the "significant aggravation" provisions of the Table. Petitioners were again found entitled to compensation. *Costa v. Secretary of DHHS*,

Case No. 90-1476V (Cl. Ct. Spec. Mstr. Nov. 5, 1992)[2]. The last of the early "omnibus" cases from the Court of Federal Claims, mandating the payment of full compensation to any TSC child whose injury fell under the Initial Vaccine Injury Table, is reported at *Suel v. Secretary of DHHS*, 31 Fed.Cl. 1 (1993).

8. The special master's entitlement decision in favor of Michael Hanlon was issued on May 31, 1994. (Decision, 1a to 7a.)[3] Rachel Plavin was found entitled to vaccine injury compensation in a Decision which issued on December 29, 1994. (Decision, 8a to 12a.)

9. Pursuant to the government's motion filed March 24, 1995, and over strident objection, the special master reopened entitlement in all TSC vaccine injury cases. Petitioners objected, without avail, that reopening was improper in the absence of exceptional circumstances, sufficient to justify reopening of a final determination. The petitions of Michael Hanlon and Rachel Plavin were also designated as "test cases." After more than two years of intense litigation, with two additional trial proceedings, the previous doctrine was revisited and reversed. *Barnes v. Secretary of DHHS*, WL 620115 (Fed. Cl. Sp. Mstr. Sept. 15, 1997). ("TS Omnibus Decision," 13a to 74a.)

10. Both petitioners were required to seek review of *Barnes* in the United States Court of Federal Claims. On Michael Hanlon's separate motion for review, the special master was upheld. *Hanlon v. Secretary of DHHS*, 40 Fed. Cl. 625 (Fed. Cl. 1998) (110a to 128a). Rachel Plavin obtained a remand to the special master. *Plavin v. Secretary of DHHS*, 40 Fed. Cl. 609

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[2]Another special master validated the right to entitlement under actual causation standards in *Copeland v. Secretary of DHHS*, 1993 WL 12894 (Fed.Cl. Spc. Mstr Jan 7, 1993). Although the special master disagreed with the "significant aggravation" thrust of *Costa*, she felt constrained to follow it.

[3]Significantly, in the bench ruling, *Hanlon v. Secretary of DHHS*, No. 90-1013V (Fed. Cl. Spec. Mstr. May 31, 1994), she referred to the doctrine articulated by the Court of Federal Claims in the TS appeals of *Suel, supra* and *Costa, supra*, as "a judicial mandate." (App at 7a.)

(1998) (79a to 109a). On remand, the special master reaffirmed her dismissal of the petition. *Plavin v. Secretary of DHHS*, 1998 WL 408793 (Fed. Cl. Spc. Mstr.) (129a to 136a). On subsequent review by the Court of Federal Claims, the *Plavin* matter was affirmed. *Plavin v. Secretary of DHHS*, 41 Fed. Cl. 671 (1998) (137a to 142a).

11. Of the many pending cases involving Table vaccine injuries suffered by children with TS, only the *Suel* case, *supra* was exempted from the proceedings leading to the TS Omnibus Decision. Required by the terms of Judge Merow's earlier remand to adjudicate damages, the special master awarded compensation in an order reported as *Suel v. Secretary of DHHS*, 1997 WL 617034 (Cl Ct. Spc. Mstr.).

12. In proceedings parallel to the petitioners' appeals herein, the government sought review of *Suel*, challenging the denial of a motion to reopen, and asserting that its "new" evidence would compel reconsideration. Judge Merow upheld both entitlement and damages. *Suel v. Secretary of DHHS*, Case No. 90-934V (Fed. Cl. May 8, 1998) (Unpublished).

13. The government appealed *Suel* to the Court of Appeals in and for the Federal Circuit. Michael Hanlon's appeal, along with the appeal in Rachel Plavin's case, was consolidated with *Suel* for argument in the Court of Appeals.

14. *Suel* and *Hanlon* were both affirmed by the Court of Appeals. The appellate decision uphold diametrically opposite results (compensation for David Suel, denial of compensation and dismissal with prejudice for Michael Hanlon and Rachel Plavin[4]). *Compare, Hanlon v. Secretary of DHHS*, 191 F.3rd 1344 (Fed. Cir. 1999) (143a to 150a); *Suel v. Secretary of DHHS*, 1999 WL 722551 (Fed. Cir.) (petition for rehearing pending).

15. *Suel* and *Hanlon* create inconsistent binding precedent for propositionally identical cases in the Office of

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[4]The Federal Circuit affirmed reopening and reversal of entitlement in *Plavin* via a memorandum opinion, incorporating the reasoning of *Hanlon*. *Plavin v. Secretary of DHHS*, 184 F.3d 1380 (Mem.) (Fed. Cir. 1999). Appendix at 151a.

Special Masters. In the Court of Federal Claims, *Suel* rejected the argument forwarded by the government that the "new" evidence[5] was dispositve and compelling. While both reviewing Courts in *Suel* adhered to traditional standards of finality, in stark contrast, both reviewing courts in the *Hanlon* case endorsed the proposition that "reopening" is discretionary. Under the *Hanlon* line of authority, reconsideration is subsumed into the ordinary trial court function of determining the admission of evidence. Thus, anytime before formal entry of judgment, the grant of a new trial is "discretionary."

16. Under *Suel*, the "entitlement" decision as it was reviewed and remanded was seen as a final judgment, even though formal judgment did not enter for another six years. *Id.*, 1999 WL at *3. Under *Suel* the doctrine of Law of the Case militates against reopening, and *Suel* requires "compelling circumstances" to justify reconsideration. The *Hanlon* cases did not recognize this universal legal threshold.

REASONS FOR GRANTING THE WRIT

A. Certiorari should be issue to the Court of Appeals below because it created precedent for the Vaccine Program by deciding an important federal question in direct conflict with many rulings of the Supreme Court, *e.g.*, *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912); *see also Arizona v. California* 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 1391 n. 8, 75 L.Ed.2d 318 (1983) (threshold for deviation from the doctrine is a conviction by the court that its prior decision "is clearly erroneous and would work a manifest injustice"). The unprecedented doctrine below also conflicts with the opinion of the Court of Appeals in its companion case, *Suel v. Secretary of DHHS*, 1999 WL 722551, *pet for reh. filed* Oct. 29, 1999.

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[5]In *Suel*, 1999 WL at *4, Judge Black cited prior Federal Circuit authority retative to "a close case" where "reasonable minds could differ on the outcome."

The Court of Federal Claims, which has the review prerogative in the Vaccine Program, does not recognize its own pronouncements as precedent[6]. Therefore, this situation cries out for exercise of the supervisory jurisdiction of the Court. The vaccine special masters are required to choose between, to interpret, and to apply conflicting pronouncements. But inconsistency is the antithesis of the rule of law. Courts should "act alike in all cases of like nature." *Ward v. James*, (1966) 1 Q.B. 273, 294 (C.A.) (Quoting Lord Mansfield in John Wilkes's case, *Rex v. Wilkes*, 98 Eng. Rep. 327, 335 (1770).

The opinion below creates an anomaly: "discretionary" reopening of final determinations in a system which was designed to award compensation for vaccine injury "quickly, easily, and with certainty and generosity." H.R. Rep. No. 908, 99th Cong., 2nd Sess. 3 (1986) *reprinted* 1986 U.S.C.C.A.N. 6344.

The issue of whether an "entitlement" decision is entitled to finality is of extraordinary importance in the administration of the Childhood Vaccine Program. A doctrine espousing "discretionary"—and even serial—reopening, in the absence, *e.g.*, of "newly discovered evidence" (and its attendant heavy burden), allows the Secretary to prolong litigation and delay by years the payment of compensation. Where reopening and reconsideration, as herein, defeats the right to compensation which has already been fairly tried and adjudicated, it severely undermines public confidence in the judicial system and the Vaccine Program. It also frustrates the express intent of Congress.

B. The erroneous ruling below has tremendous practical consequences. In addition to interminable delay, great mischief is created by rulings in derogation of traditional notions of finality. "Discretionary" reopening has occurred a substantial number of

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[6]Under *American Satellite Co. v. United States*, 22 Cl. Ct. 547 (1991), the decisions of the Court of Federal Claims are not binding on judges of the Court, and *a fortiori*, the special masters. *Accord, Hanlon v. Secretary of DHHS*, 40 Fed. Cl. at 630 ("Special Masters are neither bound by their own decisions nor by cases of the Court of Federal Claims, except, of course, in the same case on remand.")

times in the Vaccine Program.

Bifurcation of entitlement and damages is the norm in the Vaccine Program. *See*, Chief Special Master's General Order of April 22, 1991; *see also* Guidelines for Practice Under the National Vaccine Injury Compensation Program, Guideline X. Bifurcation allows a vaccine injury petitioner to avoid the needless[7] or duplicative expenditures of money for a Life Care Plan, used to demonstrate the petitioners' position with regard to appropriate compensation. *Ibid.* But petitioners who have proceeded into the expensive process of obtaining a Life Care Plan, in reliance on an "entitlement decision," have been suddenly required to abandon that process, and to relitigate entitlement.

As a vital matter of sound jurisprudence, bifurcation cannot be an excuse for a doctrine which posits that a fully and fairly litigated "entitlement decision" is **not** a "final determination." Where entitlement has been litigated to a final determination, and reopening is granted, the process essentially starts over. Months and years of delay work an injustice, especially in a program specifically designed by Congress for its speed and ease of adjudication:

> "The Committee notes that much of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the petitioner can expect judgement; ***without such quick and certain conclusion of proceedings, the compensation system would work an injustice upon the petitioner.***" H.R. 99-908, p. 17, *reprinted* 1986 U.S.C.C.A.N. 6344, 6358. Emphasis added.

The Courts below have vacillated on the critical issue of

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[7] If a petitioner loses on "entitlement," there is no need for a Life Care Plan. And because years often pass between the "entitlement" and "compensation" phases of this highly adversarial litigation, a Life Care Plan filed at the time of a petition would not illuminate the petitioner's "course of the condition . . . until the date of judgment," which the court must consider under 42 U.S.C. §300aa-13 (b) (1).

whether comprehensive adjudication on causation issues, in a bifurcated proceeding, leading to a "Decision on Entitlement," is a "final determination[8]." *Compare*, the Court of Federal Claims decision in *Hanlon, supra*, 40 Fed. Cl. at 632 (reopening upheld when "special master had issued a ruling on entitlement but a final judgment had not entered," citing with approval a test from *Vant Erve v. Secretary of DHHS*, 39 Fed. Cl. 607 (1997)), with the unpublished Order written by Judge Merow in *Suel v. Secretary of DHHS*, NO. 90-935V (Fed. Cl. May 8, 1998), slip op. at 4:

> "It is recognized that in *Erve v. Secretary* . . .the factor of time is discounted in reviewing and reversing a decision by the Special Master not to reopen entitlement. However, to promote a lengthy, years long search for ultimate truth ignores the basic premise of the Vaccine Act, set forth previously, that awards will be made 'quickly, easily, and with certainty and generosity.'"

Compare also the Federal Circuit *Hanlon* decision, 191 F.3d at 1350 (App. at 149a-150a, citing *McAllister v. Secretary of DHHS*, 70 F.3d 1240 (Fed. Cir. 1995)), where reopening is seen as a matter of "discretion[9]," with the Federal Circuit opinion in *Suel v. Secretary of DHHS, supra*, 1999 WL 722551, at *5 ("the new evidence relied upon to override law of the case must be substantial, even conclusive, before it is appropriate to reopen

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[8]Under 42 U.S.C. §300aa-12 (d) (3) (A), "(t)he decision of the special master shall . . . include findings of fact and conclusions of law," and under subsection 12 (f), "findings of fact and conclusions of law of the United States Claims Court on a petition shall be final determinations of the matters involved." Herein, the "entitlement" Decisions (1a to 7a and 8a to 12a) included the requisite findings of fact and conclusions of law. But these were **not** afforded finality.

[9]*McAllister* reaches a correct result on the merits, because it allows (as the Act at §300aa-13 requires) a **damages** determination to be "updated" after remand but prior to entry of formal judgment. The *dicta* followed by the Federal Circuit *Hanlon*, however, goes too far. This provision of the Act does **not** commit reopening of a final determination on **entitlement** to the discretion of the special master.

substantial, even conclusive, before it is appropriate to reopen a judgment[10]").

C. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the Court of Federal Claims and its Office of Special Masters, as to call for an exercise of this Court's supervisory power. The Secretary has successfully argued, and the Courts below have frequently ruled, as herein, that traditional notions of finality do not apply under the Vaccine Act. Even though the statute at 42 U.S.C. § 300aa-12 grants the sole trial jurisdiction to the special master, and at subsection (f) provides that findings of fact and conclusions of law constitute a "final determination" of the issues involved, the Secretary posits that § 300aa-13 (b) (1) requires the special master literally to reopen **anytime**, to "consider the entire record . . . until the date of the judgment."

Manifestly, this statutory language was not intended by Congress to create an exception to the traditional notions of finality which are so vitally important to orderly adjudication. The last five words ("until the date of the judgment") are separated from the clause "consider the entire record" by an intervening phrase (to-wit: "and the course of the injury, disability, illness, or condition"). Under the accepted principles of statutory construction, the clause "until the date of judgment" modifies only its immediate antecedent, *i.e.*, "course of the injury, disability, illness or condition."

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[10]The Federal Circuit in *Suel* referred to the entitlement decision (as reviewed by Judge Merow **six years** before formal entry of judgment) as "the entitlement ***judgment***." *Id.*, 1999 WL 722551 at *6, emphasis added. This is the "problem" which the government laments in its pending petition for rehearing in the Federal Circuit. However, the fact that judgment does not enter under § 300aa-12 (e) (3) until damages have been ascertained, and review is complete in the Court of Federal Claims, is utterly immaterial. Law of the Case precedent in the Federal Circuit, in direct conflict with its decision herein, establishes that bifurcation does not detract from the finality of a dispositive ruling on a discrete determination made after full and fair trial, in bifurcated proceedings. *W.L. Gore & Associates v. International Medical Prosthetics Research Association*, 975 F.2d 858, 863 (Fed. Cir. 1992).

master to "consider the entire record" begins with the words, "In determining ***whether to award compensation*** . . ." Emphasis added. This contemplates the bifurcated "entitlement" trial. When a special master determines "whether to award compensation," the "record" must be already complete, the evidence tried or otherwise presented, in order to enable the adjudication. This discrete issue, of "whether to award compensation," once tried and decided, should not be subject to endless or routine reconsideration, in the "discretion" of the special master, and *a fortiori* at the whim of the government.

Reinforcing the conclusion that they apply to the discrete issue of entitlement, the words "consider the entire record" are part of a directive to "evaluate . . . any diagnosis, conclusion, medical judgment, or autopsy or coroner's report which is contained in the record ***regarding*** . . . ***causation*** . . . of the petitioner's illness . . ." Emphasis added. Therefore, after causation—*i.e.*, "entitlement" is made the subject of the "final determination" contemplated by § 300aa-12 (f), the provisions of § 13 (b) (1) are satisfied. These provisions are **not** statutory authority for serial reopening, simply because "judgment," fortuitously, does not issue until **after** the bifurcated damages proceedings. Judgment in fact does not even enter until **after** the first level of appeal, the statutory "review" by the Court of Federal Claims.

Certiorari should issue to correct the jurisprudential aberration below, whereby the Vaccine Act has been interpreted to vest a special master with "discretion" to reopen a final determination. The TS cases and many others (*e.g.*, *Vant Erve*) have been endlessly reopened[11] in the absence of any grounds,

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[11]In *Vant Erve, supra*, the petition was filed in 1992, and petitioner was found entitled to compensation in an "entitlement" decision which issued some 25 months after the petition was filed. *Vant Erve v. Secretary of DHHS*, 1994 WL 325426 (Fed. Cl. Spec. Master June 21, 1994). **Three years** later, the Secretary moved to reopen, and the special master denied her motion. *Vant Erve v. Secretary of DHHS*, 1997 WL 383144 (Fed. Cl. Spec. Master June 26, 1997). The next day, compensation was awarded. *Vant Erve v. Secretary of DHHS*, No. 92-341V, slip op.

e.g., in the form of exceptions to the doctrine of Law of the Case[12]. An orderly adjudication process is **impossible** with the doctrine below in place. And judicial efficiency, the settled expectations of the parties, speedy adjudication—all aspects of the initial "final determination"—traditionally protected by Law of the Case and its companion doctrines, are frustrated by the doctrine below.

Petitioners in this matter, and petitioners in general in the Vaccine Program, are placed into an impossible situation by the precedent created below. If "omnibus" doctrine is to be created and enforced system-wide by the trial tribunal, the law should require that all parties to the litigation be bound. Once such a rule is in place, parties should be entitled to rely upon it. "Discretionary" reopening of such decisions leads to chaos, and ultimately to miscarriage of justice. The writ should issue to enforce traditional notions of finality in the Vaccine Program, as they are enforced in every Court in this land.

(Fed. Cl. Spec. Master June 27, 1997). Appeal to the Court of Federal Claims resulted in reversal, with a mandate for reopening (*Vant Erve, supra* p. 12). Ultimately, the special master reversed his own factfinding. *Vant Erve v. Secretary of DHHS*, 1998 WL 887126 (Fed. Cl. Spec. Master Dec. 3, 1998). The Court of Federal Claims affirmed. *Vant Erve v. Secretary of DHHS*, 43 Fed. Cl. 338 (1999). Appeal was docketed in the Court of Appeals, No. 99-5093 (Fed. Cir. May 13, 1999).

[12]Even a TS case adjudicated by another special master is not immune to "discretionary" reopening. In *Copeland v. Secretary of DHHS*, 1993 WL 12894 (Fed.Cl.), after reopening in light of *Costa, supra*, Special Master E. LaVon French granted compensation. The case was transferred to Special Master Millman almost a year after the TS Omnibus was reopened, and is pending in front of her, ostensibly for application of the TS Omnibus "rule." This is highly improper. *See, e.g., Hardy v. North Butte Mining Co.*, 22 F.2d 62 (9th Cir. 1929), quoting *Appleton v. Smith*, 1 Fed. Cas. 1075, no. 458: "It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate." *See also In re Plantation Manor Restaurant*, 45 Bankr. 229, 231 (Bankr. E.D. & W.D. Ark. 1984) ("the reversal of one coordinate judge by another can only stultify the law and cheapen the judicial process.")

Respectfully submitted this 18th day of January, 2000.

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